



*The Case for Fair Competition*

*Testimony*

*Of the*

*Honorable Marilyn Praisner*

**On behalf of**

**NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS,**

**NATIONAL LEAGUE OF CITIES,**

**UNITED STATES CONFERENCE OF MAYORS,**

**NATIONAL ASSOCIATION OF COUNTIES,**

**AND**

**TELECOMMUNITY**

**November 9, 2005**

**Washington, D.C.**

## **I. INTRODUCTION**

Good Morning, Chairman Upton, Mr. Markey and Members of the Subcommittee, my name is Marilyn Praisner. I am a member of the County Council of Montgomery County, Maryland. I appear on behalf of the National Association of Telecommunications Officers and Advisors (“NATOA”), the National League of Cities (“NLC”), the United States Conference of Mayors (“USCM”), the National Association of Counties (“NACo”) and TeleCommunity.<sup>1</sup>

## **II. THE ROLE OF CABLE FRANCHISING**

For three decades local governments have used cable franchising authority to achieve nearly universal deployment of broadband advanced services and to protect consumers to the extent we have authority. We also know that only wire line competition reduces cable rates<sup>2</sup> and enhances service.<sup>3</sup> Therefore, let there be no mistake, local governments want competition, as fast and as much as the market and some state laws will sustain.<sup>4</sup>

---

<sup>1</sup> NLC, USCM and NACO collectively represent the interests of almost every municipal or county government in the U.S.. NATOA's members include telecommunications and cable officers who are on the front lines of communications policy development in hundreds of cities nationwide. TeleCommUnity is an alliance of local governments and their associations which are attempting to refocus attention in Washington on the principles of federalism and comity for local government interests in telecommunications. Councilmember Praisner is chairman of the Telecommunications and Technology Steering Committee for the National Association of Counties; Chair of the Executive Committee for SAFECOM; Chair of TeleCommUnity and Former Vice- Chair of Local State Government Advisory Committee to the FCC.

<sup>2</sup> Please understand that local governments are under plenty of pressure every day to get these agreements in place and not just from the companies seeking to offer service. In separate studies both the FCC and GAO documented in markets where there is a wire-line based competitor to cable that cable rates were, on average, 15% lower. United States General Accounting Office, *Telecommunications Issues in Providing Cable and Satellite Television Service*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, at 9, GAO-03-130 (2002)(“*GAO 2002 Study*”), available at [www.gao.gov/cgi-bin/getrpt?GAO-03-130](http://www.gao.gov/cgi-bin/getrpt?GAO-03-130); *In re Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report On Cable Industry Prices, MM Docket No. 92-266, 17 FCC Rcd 6301, Table 6 (2002)(“*2002 Cost Report*”).

<sup>3</sup> For over thirty years local governments have granted incumbent cable operators and competitive broadband providers non-exclusive franchises to use public property to provide cable service and non-cable

In an effort to promote competitive cable offerings, in 1992, Congress amended 47 U.S.C. 541(a)(1) to ban the granting of exclusive cable franchises and imposed an affirmative obligation on franchising authorities to “not unreasonably refuse to award an additional competitive franchise....”<sup>5</sup> There have been very few cases filed pursuant to Section 621(a)<sup>6</sup>, and even fewer of these claims have found fault with local franchise authority grants or refusals.<sup>7</sup>

---

services. Grants of exclusive franchises, which were rare, were prohibited by the 1992 Cable Act. 47 U.S.C. § 541(a)(1). New entrants and incumbent cable operators are using new and upgraded systems to offer bundled combinations of video programming, Internet access, and telephone service to increase per subscriber revenues.

<sup>4</sup> Many states have level playing field statutes, and even more cable franchises contain these provisions as contractual obligations on the local government. So when a new provider comes in and seeks a competitive cable franchise, there is not much to negotiate about. If the new competitor is seriously committed to providing as high a quality of service as the incumbent, the franchise negotiations will be neither complicated nor unreasonably time consuming. It is also important to recognize that every negotiation has two parties at the table. Some new entrants have proposed franchise agreements that violate the current state or federal law and open local franchise authorities to liability for unfair treatment of the incumbent cable operator vis-à-vis new providers. Some also seek waiver of police powers as a standard term of their agreement. Local government can no more waive its police powers to a private entity than the federal government can waive the constitutional rights its citizens.

<sup>5</sup> See Subsec. (a)(1). Pub. L. 102-385, § 7(a)(1))

<sup>6</sup> As of October 26, 2005, an electronic search of the Westlaw system reveals 13 published opinions which cite Section 541(a)(1). The 13 published opinions represent 11 different controversies. Two of the controversies have trial court and appellate court opinions. Of the 11 different cases;

- Two were brought against the US government acting as a cable operators on military bases (*Americable International, Inc v. Dept of Navy*, 129 F.3d 1271, (D.C. Cir. 1998) (Navy’s refusal to grant a SMATV contract, does not rise to a §541(a)(1) violation.); *Cox Cable Comm., Inc. v. United States*, 992 F.2d 1178 (11th Cir.1993) (11<sup>th</sup> Circuit found a violation when Robins Air Force Base granted an exclusive cable franchise to Centerville Telecable, the winner of a competitive bidding process.);
- Four of the cases saw local government citing to the section as a justification for their actions. Twice local government has unsuccessfully cited Section 541(a)(1) as means to defeat exclusive franchises that pre-dated the Cable Act.( *James Cable Partners v. City of Jamestown*, 43 F. 3d 277 (6<sup>th</sup> Cir. 1995); *Service Electric Cablevision v. City of Hazleton* 2005 WL 2020452 (M.D.Pa. 2005). Once it was used to defend against a claim of favoring a competitor over an incumbent (*Cable TV Fund v. City of Naperville and Ameritech New Media, Inc.*, 1997 WL 280692 (N.D. Ill., 1997) and once to demonstrate that the cable franchising process did afford due process standards. *Liberty Cable v. The City of New York*, 893 F.Supp 191 (S.D. New York, 1995)
- One case was brought against a private developer.

While there are not a great many common threads in the Section 541(a)(1) cases, there are two absolutes. A party must ask for a franchise before an LFA can be found to have unreasonably denied the grant of a second franchise. “A natural reading of § 541 requires that Houlton Cable apply for a second franchise before it can ask this Court to review whether it is reasonable to refuse one.” *NEPSK, Inc. v. Town of Houlton*, 167 F.Supp.2d 98, 102 (D.Me 2001) – See also *NEPSK, Inc. v. Town of Houlton* 283 F. 3d 1 (1st Cir., 2002); The requesting party must be asking for a new franchise and not a renewal. In *I-Star Communications Corp. v. City of East Cleveland*, 885 F.Supp. 1035 (N.D.Ohio 1995). the District Court

### III. IS THE 4<sup>TH</sup> TIME THE CHARM?

Much like you, local governments have been gravely disappointed with the telephone industry's past promises-made versus reality-delivered. Three times before, in 1984, 1992, 1996, the telephone industry promised Congress it would enter the video services business. Each time Congress amended the laws to permit the entry. Now they ask again.

While local government will never agree that the local franchise process has impeded video competition, we are prepared to explore different means of streamlining the process.<sup>8</sup> We are, however, skeptical.

---

for the Northern District of Ohio held that I-Star did not state a claim for relief pursuant to § 541(a)(1) because the case concerned the City's efforts to revoke I-Star's existing franchise, not a denial of an application for a "second competitive franchise."

<sup>7</sup>In thirteen years, only twice has a local government LFA been found to violate or potentially violate Section 541(a)(1). In one case the violation was a matter of semantics and in the other the finding was procedural. In *Qwest v. Boulder* 151 F.Supp.2d 1236 (D. Colorado, 2001) Qwest was providing cable programming in Boulder through a revocable permit granted by the city. In addition to Qwest, TCI was also providing cable in the city by means of a revocable permit, while Wild Open West, a third provider, was offering cable in the city by means of a franchise. Testimony was presented to explain that Qwest and TCI operated under a revocable permit rather than a franchise as the city's charter required a vote of populace for the issuance of a franchise. Wishing to avoid the expense of such an election, Qwest sued arguing that the election provision was preempted by §541(a)(1) and the Court agreed. In *Classic Communications Inc. v. Rural Telephone Co.*, 956 F.Supp. 896 (D. Kansas, 1996) Telecommunications company and its telephone and cable television subsidiaries brought suit for refusal to grant cable television franchises to cable television subsidiary. The Kansas District court denied the cities' motion to dismiss stating: whether the Cities' refusal was unreasonable is not an issue at this stage of the litigation.

#### <sup>8</sup> **Franchising is not a Barrier to Competition**

The concept of franchising is to manage and facilitate in an orderly and timely fashion the use of property. For local governments, this is true regardless of whether we are franchising for the provision of gas or electric service, or whether we are providing for multiple competing communications services – all of which use public property. As the franchisor – we have a fiduciary responsibility that we take seriously, and for which we are held accountable.

#### Franchising is a National Framework with an Essential Local Component

Franchising is essentially a light touch national regulatory framework with local implementation. The 1992 Cable Act authorizes local governments to negotiate for a relatively limited range of obligations that are imposed upon cable operators. Virtually none of these obligations are mandatory. Each one is subject to decision-making at a local level.

#### Local Franchising is Comparatively Efficient, and Must Be Fair to Protect All Competitors

Franchising is not intended to be complex or time-consuming, but fair to incumbent, competitor and consumers. In some communities, operators bring proposed agreements to the government based on either the existing incumbent's agreement or a request for proposals, and with little negotiation at all an

Most recently in Texas, telcos were given what they wanted, fast track franchises. But Verizon and SBC, months after the law was put on the books, have offered to provide competitive choice to less than one percent of Texas households. Is the nation giving up the consumer protections and community benefits in the current franchising system just to provide choice to one percent of the population?

#### **IV. THE SOLUTION ON THE TABLE**

Local government came to the table in search of a legislative compromise and we remain clear about our broad parameters:

1. Universal service, E-911, local emergency alerts and the nation's homeland security in an IP era must be preserved.
2. State and local governments' property rights and our authority for managing the nation's rights-of-way must be kept whole. Private, for-profit, and quasi-permanent occupancy of the most valuable real estate held by government must

---

agreement can be adopted. In other communities, where the elected officials have reason to do so, a community needs assessment is conducted to ascertain exactly what an acceptable proposal should include. Once that determination is made, it's up to the operator to demonstrate that they can provide the services needed over the course of the agreement.

##### The Current Framework Safeguards Against Abuse and Protects Competition

The current framework ensures that all competitors face the same obligations and receive the same benefits, ensuring a fair playing field. Federal safeguards protect against abuse. Local government is generally prohibited from requiring a provider to use any particular technology or infrastructure such as demanding fiber or coaxial cable. They can require that certain minimum technical standards be adhered to and that systems are installed in a safe and efficient manner. Local government ensures compliance with the National Electric Safety Code to protect against threat of electrocution or other property damage. Local rules can also require that signal quality be up to federal standards, and that systems are maintained to provide subscribers with state of the art transmissions. Similarly, it is local government that inspects the physical plant and ensures compliance on all aspects of operations. We work closely with our federal partners and cable operators to ensure that cable signal leaks are quickly repaired before there is disruption or interference with air traffic safety or with other public safety uses of spectrum.

be fairly compensated—both through social obligations to the community served and in rental fees.

3. Local governments must have the right to provide broadband transport and communications services to themselves and to their constituents to further important community interests.
4. The local telephone company franchise should be comparable to the terms and conditions applied to their cable competitors.
5. Consumers need choice of broadband providers with guaranteed network neutrality. The owner of the broadband pipe should never discriminate among service providers nor limit the consumer's access to those services.

## **V. BITS I**

The national local government organizations directed our staffs to meet with your collective counsel to craft a solution. The fruit of those labors was the first staff draft, or “BITS I.”

BITS I, while not perfect, was a good start.<sup>9</sup> It reflected a non-partisan dialogue with all the impacted parties (federal, state, and local governments, industry and consumers) at the table. It evidenced a respect for and agreement with many of the essential elements outlined on the above issues. And, we were invited to assist in strengthening those areas where local government believed the staff had missed the mark.

## **VI. BITS II**

---

<sup>9</sup> A copy of the memo local government shared with the bi-partisan staff is attached hereto as Appendix A. The memo reflects that there was much to embrace in BITS I and most of local government's comments sought to perfect the bill, not kill the legislation.

The revised staff draft, BITS II, on the other hand, breaks faith with those deal points. Though it provides for local government provisioning of broadband transport and services and makes an effort to preserve narrow-band universal service, E911 and homeland security in the IP era; the draft is seriously flawed. In this draft the telephone companies get everything they have asked for including fast track franchising, while avoiding most social obligations –and everyone else loses.

1. Public safety standards are determined by the industry without proper oversight.

Local government is permitted only to enforce what the industry deems important. This is a ridiculous intrusion by the federal government and the private industry into the management of local streets and sidewalks.

2. State and local government is not kept whole. BITS II limits rights-of-ways fees to the recovery of management costs. And Broadband Video franchise fees are limited to 5% of subscriber revenue, not 5% of all video service related revenues which is standard today. In other words, Telcos not only get out from under franchising, they get subsidized use of local government's property. As a comparison, the federal government charges a full market price to use public spectrum. Again, by these provisions, Congress clearly expresses favoritism towards one segment of the industry by granting subsidized rights to access public property, and local government revenues are severely curtailed in the process.
3. Community needs and interests are essentially abandoned. While cable must continue to support local community needs and interests such as PEG I-Nets and emergency alerts, the telcos do not. This results in governmental discrimination favoring one class of video provider and a reduction in community benefits.

4. Consumers lose choice and competition. Broadband competitors can buyout their competition. There is no network neutrality.

Collectively, these changes break faith with the promises of the Committee leadership and the promises of the industry. BITS II would not even replicate the rental fees contained in the recent Texas franchising legislation. We can only assume that Texas members want to preserve the compromise the industry agreed to not less than two months ago in Austin.

## **VII. HISTORICAL AND CURRENT ROLE OF SOCIAL OBLIGATIONS**

Finally, I welcome this opportunity to discuss with you the important social obligations inherent in current video regulation, and to explain why these core functions must be preserved, no matter the technology used to provide them. These include the allocation of capacity for the provision of public, education and government access channels, prohibitions on economic redlining, and a basic obligation that local government evaluates and the provider meets the needs of the community, including public safety needs.

### *PEG Channels*

Historically and today, locally produced video programming performs an important civic function by providing essential local news and information. Under the existing law, local government can require that a certain amount of cable system capacity and financial support for that capacity be set aside for the local community's use. This capacity is most often used in the form of channels carried on the cable system and are referred to as PEG for public, educational and governmental channels. Once the local franchise authority has established the required number of channels and amount of financial



support required to meet community needs, they then determine the nature of the use, which may be mixed between any of the three categories. Public channels are set aside for the public and are most often run by a free-standing non-profit entity. Educational channels are typically reserved for and are managed by various educational institutions. Government channels allow citizens to view city and county council meetings, and watch a wide variety of programming about their local community that would otherwise never be offered on commercial or public television. Whether it is video coverage of the governmental meetings, information about government services or special programs, school lunch menus, homework assignments or classroom instruction, the video programming used to disseminate this information allows all of us to better serve and interact with our constituents. Government continues to make innovative uses of this programming capacity as new interactive technology allows even better information to be available to our constituents.

Many of you and your peers use this vital resource as a means to report back and to interact with your constituents at home. Local and state officials also use this important medium, and we want to ensure that it continues to be available now and in the future.

It may be possible that through deliberative processes such as this hearing, we will identify new technological opportunities to assist us in our outreach to our citizens, but I suggest to the Committee today that these public interest obligations continue to serve an important purpose and must be preserved, regardless of the technology that allows us to make the programming available. I hope that you'll join with me in calling for the

continuation of such opportunities in the new technologies that are evolving today. Certainly I should hope that you would not follow the tantalizing concept of reducing obligations on providers without careful consideration.

### *Economic Redlining*

One of the primary interests of local government is to ensure that services provided over the cable system are made available to all residential subscribers in a reasonable period of time. These franchise obligations are minimal in light of the significant economic benefits that inure to these businesses making private use of public property. While there may be those who find this provision unreasonable – we find it to be essential. Those who are least likely to be served, as a result of their economic status, are those who we need most to protect. This deployment helps to ensure that our citizens, young and old alike, are provided the best opportunities to enjoy the highest quality of life – regardless of income. The capacity that broadband deployment offers to our communities is the ability of an urban teen to become enriched by distance education opportunities that until recently couldn't possibly capture and maintain the interest of a teen (much less many adults). And, that's just the beginning – the possibilities are endless, as is the creativity of those in local government on making the most they can with the least they have.

### *Public Safety & Community Needs*

Local leaders often focus on the needs of their first responders when evaluating community needs. The current law provides that local governments may require the development of institutional networks as part of the grant of a franchise. This network is specifically for the purpose of serving non-residential areas such as government facilities

including police, fire, schools, libraries and other government buildings. This infrastructure is typically designed to use state of art technology for data, voice, video and other advanced communications services. It has proven effective not only for day to day training and operations – but essential in emergencies, including the events of September 11, 2001.

For example, the City of New York uses an INET for distance learning among city educational institutions, for city-wide computer network connectivity, for criminal justice applications (video arraignments), for employee training including first responder training, and for ensuring redundant intelligent communications capabilities for all of its police, fire and first responder needs. This network is constantly being improved upon, but functioned in many important capacities during the losses suffered on September 11, 2001. This network not only offers capacity for the city all year round, but redundancy in times of an emergency.

Again, many Members of Congress live in communities that have required the deployment of these services, and are planning and using this infrastructure and the services to protect and serve the needs of their citizens. For instance the communities of Palo Alto, California, Marquette, Michigan, Laredo, Texas and Fairfax County, Virginia are all examples where the local government has determined that use of an institutional network is in the best interests of their community.

## **VIII. CONCLUSION**

Local government officials across the country are going to be very unhappy if this bill moves forward. We solicit the support of the bi-partisan leadership and every member of this Subcommittee for our efforts to protect your and our constituents. We also appeal to your sense of fair play. This bill breaks faith with the promises we were made in exchange for our support of a solution. We were promised consumer choice, fair competition and preservation of our rights-of-way authority, and that local governments would be kept whole. BITS II reneges on all three promises. Any Member who supports BITS II without amendment will break faith with local government and consumers.

Local government is ready to continue to negotiations on appropriate legislation prior to markup. We will come back to the table this afternoon and work through the Christmas break, if necessary, to achieve such a result.

Thank you. I look forward to answering any questions you may have

## Appendix A

### Local Government Initial Comments to the House Staff Draft of 9-15-05

#### Local Governments support the following:

- Local government determines public access channel (PEG) obligations and bonding requirements and Video provider must satisfy local authority before offering service.
- All new technology providers must pay franchise fees.
- Subjecting the new class of “Broadband Video Service” and services integrated with it to a franchise fee.
- The definition of gross revenue is an acceptable compromise.
- The draft takes a sound approach to right of way damage or facilities abandonment, but some management changes are needed.
- Municipal broadband provision is sound, provided no cross subsidization language is added.
- Concepts of network neutrality/open access.

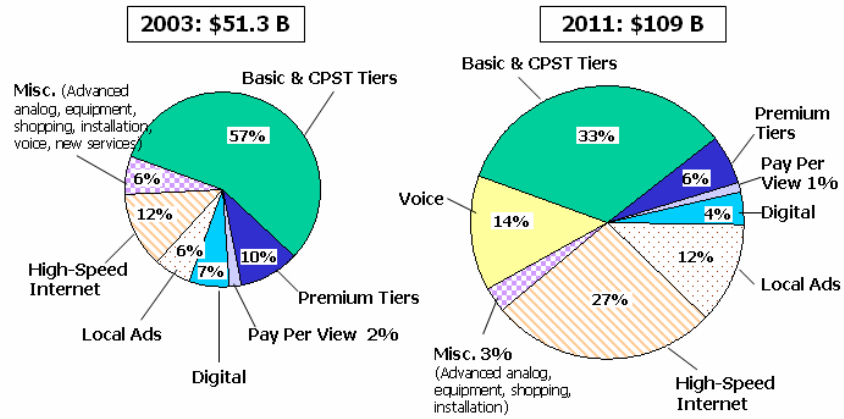
#### Local Governments have the following concerns:

- The FCC is the wrong place for right-of-way and franchise fee dispute resolution. The FCC lacks capacity and expertise. The present court enforced mechanism works and is appropriate.
- To remain whole and to protect public safety networks, local governments require compensation for current in-kind services received via franchising in addition to the current franchise fee.
- Local government must be able to protect its citizens’ interests and its rights under local, state, and federal law through effective enforcement provisions. For example, local government must be able to conduct audits and collect documents appropriate documentation to monitor operator compliance.
- The draft should include clearer and broader savings clauses, including clauses that more precisely protect local authority with respect to: taxes, zoning with respect to cell towers, damages immunity for actions related to PEG/right of way, and state and local consumer protection laws.
- While local government understands the concern, and is willing to help develop streamlined procedures for franchising, local government has strong reservations about any mechanism whereby the federal government grants access to locally owned property.
- Public access (PEG) capacity and use must evolve and advance with advances in commercial services and technology. Providers must be obligated to interconnect to receive PEG programming.
- While generally a strong proposal, a few adjustments are necessary to protect local government’s ability manage the right-of-way such as allocation of relocation and management costs. Companies may not create their own safeguards to protect the public health, safety, and welfare.
- Local government believes that competition is important for all users. Congress should mandate non-discrimination based upon income, race, ethnicity, etc. Local elected leaders are in the best position to make decisions about build out obligations.

# Attachment B

## CWA Outlook for Revenue by Category

### Cable Co.'s Sources of Revenue: 2003 & 2011



**Note on revenue sources:** Cable companies also collect "franchise fees" from their customers as revenue. They do not generally report these, but Comcast's figure for 2003 was 3%.

Sources: FCC, *10<sup>th</sup> Annual Report on Competition in Video Markets*, Table 4, Jan. 2004 (6/03 data); CWA forecast